

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK RAHNER,

Plaintiff,

v.

THE SEATTLE TIMES COMPANY, a  
Delaware corporation,

Defendant.

No. 2:12-cv-00880

DECLARATION OF MARK  
HIGGINS IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

I, Mark Higgins, declare as follows:

1. I make the statements in this declaration based on personal knowledge and my review of the business records of The Seattle Times Company that are kept in the usual course of business. I am competent to testify to the matters stated herein.

2. I joined The Seattle Times Company ("STC") in 1999 as the Eastside Bureau Editor. In 2004, I became the Deputy Metro Editor. I am currently employed by The Seattle Times Company as its Metro Editor, a position I have held since 2007.

3. In my role as the Metro Editor, I am primarily responsible for supervising the metro news desk staff and assistant editors. Currently, I supervise about seven assistant metro

1 editors and approximately 25 metro reporters. In years past, my reporting staff has been closer  
2 to 40.

3  
4 4. *The Seattle Times* newsroom has four primary news reporting departments: local  
5 news (also known as the “Metro desk”), sports news, features, and business and technology  
6 news. *Times* reporters work specific shifts to ensure deadlines are met and that the paper  
7 contains adequate, quality news coverage. For the last several years, the Metro desk shifts are:  
8 early morning (starting at 7 a.m.), day (9 a.m. to 6 p.m.), and evening shift (3 p.m. to 11:30  
9 p.m.).

10 5. Individual Metro reporters’ functions and duties vary according to their  
11 assignments. Some reporters hold beats that are exclusively “enterprise” in nature: they  
12 develop coverage of specific topics or themes, such as the environment. Other beats, such as  
13 the police beat and the evening general assignment beat, are primarily reactive; reporters cover  
14 breaking- and daily-news events. Such reporters often produce multiple versions of stories  
15 each day: incremental versions for publication on *The Times*’ website and other electronic  
16 platforms plus versions for the print edition. It is especially essential that these types of general  
17 assignment reporters timely report to work because: (1) reporting on the “news of the day” is  
18 time-sensitive and cannot be postponed; and (2) the newsroom relies on general assignment  
19 reporters to fill gaps in coverage. Moreover, the evening general assignment reporter works  
20 when the newsroom is especially thinly staffed. Day or night, unplanned absences by general-  
21 assignment reporters jeopardizes the quality of the news product and often forces other  
22 reporters to abandon their own responsibilities to fill in.

1           6.       Moreover, reliability and predictability are critical to our news-planning process.  
2 Editors and managers at various levels meet throughout the day and week to plan and negotiate  
3 the content of the paper and the website. Each day, editors must reconcile their story “budget”  
4 with the amount of space available in the next day’s paper, or the “news hole.” Meanwhile,  
5 when news breaks or develops, editors must be able to immediately assign that story to a  
6 reporter. That is the precise reason it is important we have general assignment reporters who  
7 are present in the newsroom and available to jump on assignments as needed. When, without  
8 warning, a general assignment reporter simply fails to show up, it undermines our ability to  
9 effectively manage our already scant resources – and the product suffers. Arriving one or two  
10 hours late without notifying a supervisor is also untenably disruptive. Most GA story  
11 assignments take place between 9 a.m. and 11 a.m.; editors need to know at the beginning of  
12 that process which reporters they can rely upon to cover the day’s news. By routinely showing  
13 up substantially late without so much as a phone call to the Metro desk, Rahner managed to  
14 dodge the story assignments altogether – thus avoiding his primary duty.

15           7.       This is especially damaging as we struggle to compete with the growing ranks of  
16 web-based news sites, including bloggers and news aggregators, many of whom provide free  
17 content. Ultimately, our financial success depends, in part, on our ability to provide fast,  
18 reliable, accurate news. A news operation must be dynamic, unflappable and flexible. It  
19 cannot succeed if hamstrung by key players who are chronically and unpredictably absent.

20           8.       Mark Rahner was a General Assignment (“GA”) reporter in the Metro News  
21 Department from late 2008 until January 2011. Assistant Metro Editor, Matt Kraemer, was his  
22 supervisor, although I was often involved in issues regarding Mark’s performance, or lack  
23

1   thereof. When STC reduced its Features department in 2008 due to budgetary constraints,  
2   Rahner was moved to Metro and spared from the possibility of layoff. As a GA reporter, he  
3   was expected to cover breaking news cycle and focus on the “news of the day.” The role was  
4   deadline driven. I was pleased to have Rahner take on the GA role and I welcomed him to the  
5   Metro department. The Metro desk had not hired a new reporter in years, and I hoped he would  
6   provide much-needed support in the role, especially given his extensive experience.

7           9.     But Rahner rejected his new role as a GA reporter. Instead of fulfilling his  
8   duties, he attempted to continue producing the sort of pop culture stories that he had written  
9   while in the Features department. Given our scarce resources to cover the basic demands of a  
10   news operation, STC no longer considered the pop culture beat a priority. Therefore, I and  
11   other newsroom managers began discussions with Rahner to ensure he understood our  
12   expectations of him in his GA role. During the meetings with Rahner, I reaffirmed that his  
13   primary responsibility was to perform as a GA reporter (not a pop culture writer). I explained  
14   that he needed to be available to report daily stories assigned by editors. Still, when time  
15   permitted, I also allowed him to produce side projects outside his official role to help assuage  
16   his frustrations and to encourage good product from him. I made clear that these projects were  
17   exceptional to his main role. A true and correct copy of an email I sent him explaining his  
18   Metro desk role is attached as **Exhibit A**.

19           10.    It soon became clear that we would need to address Rahner’s failure to perform  
20   his duties and apparent disinterest in his job. In October 2009, Managing Editor Suki Dardarian  
21   asked me to begin the process of a conducting a performance review of Rahner. A true and  
22   correct copy of that email exchange is attached as **Exhibit B**. At the time, budget cuts  
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1 precluded us from performing annual newsroom-wide performance reviews. Still, we  
2 continued to rely on ad-hoc reviews as a coaching tool for poorly performing employees. The  
3 review was completed in mid-2010. During that time, Mr. Kraemer and I continued to coach  
4 Rahner.

5  
6 11. In late 2009 and early 2010, Rahner began showing up for work almost every  
7 day one or two hours late without notifying the Metro desk of his tardiness, whereabouts, or  
8 status. On February 24, 2010, I emailed Rahner about an assignment and asked him why he  
9 was coming in late and not keeping the same schedule as other reporters. Rahner responded  
10 that he had trouble in the mornings due to “chronic fatigue” and that he “requires flexibility.”  
11 (This was the first time he told me that he suffered from CFS, despite months of conversations  
12 with me and others about his performance. He may have mention feeling tired in the past, but  
13 he never indicated that he was suffering from a chronic, ongoing problem.) I offered Rahner  
14 intermittent FMLA, referred him to accommodation resources, and directed him provide a  
15 doctor’s note so we could begin the collaborative process of exploring potential  
16 accommodations. A true and correct copy of that email exchange is attached as **Exhibit C**. I  
17 further explained to Rahner that a doctor’s note was required and needed to “explain what is  
18 happening and what you can and cannot do” in order to determine what accommodations STC  
19 can provide. A true and correct copy of that email is attached as **Exhibit D**.

20 12. About two weeks later, Rahner provided STC a note from his naturopath, Dr.  
21 Paul Dompe, N.D. It said: “Mark’s condition requires that he get adequate rest, especially  
22 during the morning hours. Please allow some flexibility in his schedule to meet his medical  
23 needs.” A true and correct copy of that email is attached as **Exhibit E**. Mark also continued to

1 mention to me on a few occasions that he had trouble getting up in the mornings because of his  
2 fatigue.

3           13. Because Dr. Dompe's letter provided only scant and vague information, I asked  
4 Rahner to provide additional information from his doctor. I also again asked him to provide the  
5 necessary paperwork for an intermittent FMLA leave in the event he needed to take time off  
6 during morning hours. For weeks, I and STC human resources staff repeatedly asked Rahner  
7 for his FMLA paperwork and additional information from his doctor. A true and correct copy  
8 of our requests via email request is attached as **Exhibit F**. For a month, Rahner gave us the  
9 impression he was seeking certification from his health care provider for intermittent FMLA.  
10 However, Rahner never provided the FMLA paperwork or additional information from his  
11 doctor that we repeatedly requested. Meanwhile, he continued to show up to work two hours  
12 late almost every day.

13  
14           14. On April 16, 2010, I met with Rahner to continue the ongoing coaching about  
15 our expectations of him as a GA reporter. I discussed his poor attendance and punctuality. I  
16 informed Rahner that, in a GA role, it was critical that he be in the office each morning at 9  
17 a.m. to receive assignments. I clarified that the schedule independence Rahner enjoyed in  
18 Features was not an option in his Metro position because it was dramatically different role that  
19 was driven by breaking news and daily deadlines. I told Rahner that if he needed to continue  
20 coming in one or two hours late every day, he needed to seek intermittent FMLA and provide  
21 the requested information from his doctor. A true and correct copy of an email documenting  
22 this conversation is attached as **Exhibit G**. He never did, again, ignoring my request and  
23 continued to consistently report to work two hours late for the next two months.

1           15.     In June 2010, Matt Kraemer and I finally completed Rahner's performance  
2 evaluation, a process we began long before he reported to us that he had CFS. In the  
3 evaluation, we highlighted the positive contributions Rahner made to the newspaper, and we  
4 raised our serious concerns related to Rahner's inability to follow the basic tenants of working  
5 in a newsroom. A true and correct copy of the 2010 Performance Evaluation for Mark Rahner  
6 is attached as **Exhibit H**. Specifically, the performance evaluation identified the following  
7 performance concerns:

- 8           •     Rahner never embraced his role as a GA reporter. We asked him for his best  
9 story ideas, but he rarely came forward with anything. For example, we asked  
10 him to put together a story proposal on how California is handling the medical  
11 marijuana issue, but he never followed through.
- 12           •     He was not a proactive, self-directed member of the team. He didn't volunteer  
13 to help and instead sat back waiting for assignments. If the assignment was  
14 something that didn't interest him, he didn't show initiative.
- 15           •     He was not collaborative. Sometimes he showed disrespect for his colleagues  
16 and didn't follow the directions of his supervisors.
- 17           •     He worked on a video project that resulted in about seven videos produced and  
18 posted on the website. In doing so, he did not accept guidance from Web and  
19 Photo staff. I learned that he ignored their repeated pleas to edit the videos  
20 tighter, and to secure permissions for outside clips and photos. The video  
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1 project eventually came to an end because he refused to have editorial oversight  
2 over the videos.

- 3 • His expense card was taken away because he continually refused to submit  
4 receipts as requested.
- 5
- 6 • His writing tone was sometimes off key. He would take a news story and try to  
7 make it humorous in a way that was not appropriate.
- 8
- 9 • He also refused to notify his supervisors when he would be late and continued to  
10 arrive two-hours late despite never having followed through with the STC's  
11 requests to provide additional information to explore accommodations.

12 16. Around the same time, in late May 2010, we needed to make some staffing  
13 reassignments in the Metro department, including filling the GA shift that runs from 3 p.m. to  
14 11:30 p.m. I discussed with other editors the idea of moving Rahner to that shift. A true and  
15 correct copy of the emails are attached as **Exhibit I**. The other editors, David Boardman, Suki  
16 Dardarian, and Jim Simon, agreed that Rahner was an appropriate choice for the job. The  
17 general job description of the evening GA position is the same as the dayside spot, but the tasks  
18 and workflow are somewhat different. Although some evenings allow downtime for reporters  
19 to pursue enterprise stories or side project, generally that shift tends to be less self-directed and  
20 driven by editors' assignments. While day-shift GA reporters often visit news scenes,  
21 interview sources, and chase down news leads, the evening GA reporter primarily works within  
22 the office. The evening reporter updates the day's top stories as they develop through the night  
23 and monitors for breaking news (e.g., checks in with police officials, watches the television



1 news, monitors certain Twitter accounts, etc.) The evening GA reporter thus ensures our  
2 coverage is relevant, timely, and accurate – and that we are not scooped by competitors. As  
3 with the day shift, reliable and predictable attendance and punctuality is an essential function of  
4 the evening GA post. A true and correct copy of the Job Description is attached as **Exhibit J**.

5  
6 17. We needed to fill the evening GA beat because the person who held that  
7 position, long-time STC reporter Charles Brown, was taking a long-term medical leave to treat  
8 terminal cancer. Mr. Brown was not expected to return to work, except sporadically when he  
9 felt up to it. He died in August 2010, a month or two after we had made the decision to move  
10 Rahner to the evening shift. Previously, when Mr. Brown took short-term medical leaves, we  
11 filled his position by temporarily rotating other reporters into that shift. That approach pulled  
12 reporters – including highly productive and successful reporters – from their beats for days or  
13 weeks at a time and dropped them into a position where they were unfamiliar with the routines  
14 and rhythms. It was an acceptable temporary measure while Mr. Brown took short-term leaves,  
15 but it was not a sustainable solution for the long run. I determined that STC needed to fill Mr.  
16 Brown's position on a permanent or semi-permanent basis to minimize the disruption and  
17 ensure quality coverage on evenings.

18 18. I had few options for filling that spot and Rahner was an obvious candidate:  
19 moving Rahner to the evening shift appeared to meet both Rahner's medical needs and our  
20 business needs. First, the move met Rahner's medical restrictions and granted his request to be  
21 excused from morning work. Rahner's doctor also specifically said that he had difficulty in the  
22 mornings. Second, it met our labor needs by filling an important position with one of only a  
23 handful of GA reporters not assigned to a particular beat who could easily transition to the

1 evening shift. Third, I believed it would foster better performance from Rahner: it was a more  
2 structured and directed role. Rahner had not succeeded day-shift GA role. He rarely generated  
3 his own stories; he often declined or ignored opportunities to contribute; he was not as  
4 productive as needed; and he made it apparent that he was unhappy in the role. I thought he  
5 would perform better in a position where particular tasks were be assigned to him and waiting  
6 for him on a daily basis, as occurs in the evening shift. I also told Rahner that we would  
7 reassess whether the change was working in six months.

8  
9 19. In July 2010, Kraemer and I met with Rahner to deliver his performance review  
10 and told him that he would be starting the evening shift in September 2010. He was not happy  
11 about the move. I told him that if he wanted to come up with an alternative proposal, we would  
12 consider it.

13 20. I didn't have much direct communication with Rahner after July 2010. He  
14 mostly communicated with HR and other editors. To my knowledge the only suggestion  
15 Rahner ever made was to either create a shift for him that started at 11 a.m. or to allow him to  
16 come and go as he pleased and without having to report his whereabouts or schedule to his  
17 supervisors. Neither of these options was feasible. The 11 a.m. shift had been tried in the  
18 newsroom before when we had a larger staff; but it was not an option in the years that followed  
19 the substantial downsizing of our newsgathering staff. And, in my view, it was not an option  
20 to have Rahner continue in his day shift GA role coming and going as he pleased. That simply  
21 does not meet the needs of his role to be a Metro general assignment reporter.

22 21. Rahner went on leave and ultimately abandoned his job altogether in 2011 rather  
23 than even try the evening shift.

1           22.     While Rahner was on leave, I understand that HR and other STC managers  
2 discussed with him and his doctor the nature of the evening shift work. Rahner apparently had  
3 said that the evening shift required more vigilance and was more stressful than the day GA shift.  
4 I don't agree with his view. The expectations of the evening reporting shift are no greater than  
5 the expectations of any other reporting shift. If anything they are lower. While Rahner would  
6 have been the only reporter on shift for a portion of the shift, there is almost always an editor  
7 available to cover breaks and support work. Much of the work is done by phone or using the  
8 web to follow Twitter feeds and other news coverage. The evening shift reporter rarely has to  
9 leave the building to go out in the field. If there is a significant breaking news event that  
10 happens during the evening shift (for example, the collapse of the I-5 Bridge at Mount Vernon),  
11 we call in other reporters.

12           23.     I also understand that during Rahner's leave, he complained to HR that I was  
13 treating him unfairly and harassing him due to his illness. Those allegations are completely  
14 false and unjustified. My understanding of his complaints about me were that I stated "You just  
15 don't like mornings" or something to that effect. I don't recall stating those words to Rahner,  
16 but we certainly discussed his inability to report to work in the mornings. I never made any  
17 derogatory or insensitive statements about Rahner's CFS or his inability to report to work in the  
18 mornings.

19           24.     To my knowledge, Rahner covered the evening shift on one or two occasions  
20 when he was working in the Metro department. There was one time when he worked the shift  
21 for a couple of weeks, which I believe was in January or February 2010.  
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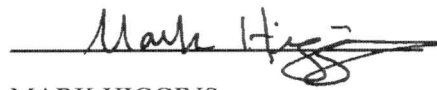
1           25.     It is my understanding that Rahner's doctor stated that he needed to take three  
2 15-minute rest breaks as needed during his eight hour evening shift. We were ready and  
3 willing to accommodate Rahner's need for rest breaks. Our plan was to have Cathy McLain,  
4 the Metro Editor covering the evening shift, accommodate any breaks that Rahner needed to  
5 take. To my knowledge, the current reporter covering the night shift, Alexa Vaughn, regularly  
6 takes breaks as needed.

7           26.     We did not hire another Metro reporter for nearly two years after Rahner left.

8           27.     Mark has stated that other reporters have the flexibility to come and go as they  
9 want. While that may have been true of his experience working in the Features department,  
10 that is not true of Metro reporters. Metro reporters have the flexibility to adjust their schedules  
11 to meet the business needs of the paper. For example, if a day shift reporter covers a story that  
12 requires him to be in the field early in the morning or late in the evening, he can adjust his  
13 schedule that day or the next day. Metro reporters also have the flexibility to attend to  
14 occasional child care needs or emergencies, or other personal obligations. When those  
15 occasional personal or health issues come up, I expect that reporters will communicate to me or  
16 their supervisor about the need to make a schedule change. It is also the case that some  
17 reporters have medical issues that require occasional absences or intermittent FMLA leave.  
18 They also are expected to communicate about their schedule and comply with the FMLA  
19 intermittent leave reporting requirements. However, no Metro reporter – and certainly no GA  
20 reporter – is given total discretion to come in whenever they want and to do so without  
21 communicating to his or her editor.  
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1 I declare under penalty of perjury under the laws of the United States of America that  
2 the foregoing is true and correct to the best of my knowledge and belief.

3 Executed in Seattle, Washington, this 3 day of July, 2013.  
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7 MARK HIGGINS  
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